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No. 00-914

IN THE
Supreme Court of the United States

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC.,
BRUCE BOSTROM AND STEVEN PETERSEN,
Petitioners,

v.

DIRECTOR OF HEALTH CARE FINANCE
ADMINISTRATION, *et al.*,
AND
FIRST CHURCH OF CHRIST, SCIENTIST,
BOSTON, MASSACHUSETTS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN MEDICAL ASSOCIATION, THE IOWA MEDICAL SOCIETY, AND THE AMERICAN NURSES ASSOCIATION IN SUPPORT OF PETITIONERS

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The American Academy of Pediatrics, the American Medical Association, the Iowa Medical Society, and the American Nurses Association respectfully submit this brief *amicus curiae* in support of Petitioner Children's Healthcare Is a Legal Duty, Inc.[1]

INTEREST OF *AMICI*

The American Academy of Pediatrics ("AAP") is a nonprofit organization of 55,000 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists dedicated to the health, safety, and well-being of children. To that end, the AAP advocates for children and their right to medical care through the adoption of professional policies, educational programs, efforts to influence social and governmental policy, and, occasionally, litigation.

The American Medical Association ("AMA") is a nonprofit organization of 275,000 physicians practicing in all fields of medical specialization. Founded in 1847, the AMA long has been committed to promoting standards, ethics, and excellence in medical education and practice and to advocacy.

The Iowa Medical Society ("IMS") is a nonprofit organization of approximately four thousand Iowa physicians practicing in all fields of medical specialization. Since it was founded in 1850, the core purpose of the IMS has been to assure the highest quality of health care in Iowa, through its role as patient and physician advocate.[2]

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[1] The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that none of the parties authored this brief in whole or in part and no one other than *amici* or undersigned counsel contributed money or services to the preparation or submission of this brief.

[2] The AMA and IMS appear herein as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition between the AMA and fifty state medical societies, whose purpose is to advocate for the interests of organized medicine in the courts.

The American Nurses Association ("ANA") is a nonprofit organization of registered nurses dedicated to the advancement of the interests of registered nurses and of the nursing profession generally. Its code of ethics mandates that the ANA work for the improvement of health standards and the ready availability and accessibility of health care to all persons regardless of their social or economic status, their individual value system, or the nature of their health problems.

The AAP, the AMA, and the IMS have adopted formal policies calling for the repeal of religious exemptions from generally applicable child abuse and neglect laws. The AAP and the AMA also appeared as *amici curiae* in *Lundman v. McKown*, 530 N.W.2d 807 (Minn. Ct. App. 1995), which concerned the civil liability of caretakers who for religious reasons denied medical care to a child, leading directly to the child's death. *Amici*'s members have a strong interest in resolution of the important Establishment Clause question at issue in this case and in correcting the Eighth Circuit's erroneous ruling below, which will discourage some parents from obtaining necessary medical care for their children.

STATEMENT

In 1965, Congress enacted the Medicare Act, 42 U.S.C. §§ 1395 *et seq.*, and the Medicaid Act, 42 U.S.C. §§ 1396 *et seq.*, in an attempt to make medical care more readily available to the public. The Medicare Act creates a system of comprehensive health insurance for the disabled and the elderly. *See id.* § 1395c. The Medicaid Act provides medical assistance to low-income families with dependent children and to impoverished individuals who are aged, blind, or disabled. *See id.* § 1396.

From their enactment until 1996, both the Medicare and Medicaid Acts contained express provisions to benefit members of the First Church of Christ, Scientist ("Christian

Science Church" or "Christian Scientists"), a religious group that objects to medical care and, with some exceptions, embraces prayer as the sole means of healing. These provisions allowed Medicare and Medicaid reimbursements for care provided in Christian Science sanatoria, institutions that treat illness by prayer alone, and exempted such sanatoria from the Acts' medical oversight requirements. On August 7, 1996, however, the United States District Court for the District of Minnesota declared the exceptions unconstitutional as facially discriminating among religious sects in violation of the Establishment Clause. *See Children's Healthcare Is a Legal Duty, Inc. v. Vladeck*, 938 F. Supp. 1466, 1485 (D. Minn. 1996) ("*CHILD I*").

In response to *CHILD I*, Congress enacted Section 4454 of the Balanced Budget Act of 1997. *See* Act of Aug. 5, 1997, Pub. L. No. 105-33, § 4454, 111 Stat. 251, 426-32 (codified in scattered sections of 42 U.S.C.). That provision replaced all references to "Christian Science sanatoria" in the Medicare and Medicaid Acts with the phrase "religious nonmedical health care institutions" ("RNHCIs"). Congress then defined "RNHCI" as an institution that, *inter alia*, "provides only nonmedical nursing items and services exclusively to patients who choose to rely solely upon a religious method of healing or for whom the acceptance of medical health services would be inconsistent with their religious beliefs," and that "on the basis of its religious beliefs, does not provide . . . medical items and services . . . for its patients." 42 U.S.C. §§ 1395x(ss)(1)(C), (F). Section 4454's incorporation of RNHCI terminology into the Medicare and Medicaid Acts enables individuals who hold religious objections to medical treatment to receive government assistance for care that they receive at RNHCIs and frees RNHCIs from all medically based

supervision. *See id.* §§ 1395x(e), 1395x(y)(1), 1395i-5(a)(2), 1320c-11, 1396a(a), 1396g(e)(1).

In this case, Children's Healthcare Is a Legal Duty, Inc. and two of its members, Bruce Bostrom and Steven Petersen, filed suit in the United States District Court for the District of Minnesota, claiming that Section 4454 establishes religion in violation of the First Amendment. The district court found that Section 4454 is a permissible accommodation of religion under the Establishment Clause. The Eighth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

Amici believe that the Establishment Clause questions presented in this case warrant this Court's review. The ruling below represents a large and unjustified expansion of the concept of permissible governmental "accommodation" of religion because it applied that concept to a law that creates special benefits for certain religious groups and their adherents that are not available to the general public. It also defies the principle that government should not set out to endorse, or support, particular religious beliefs and institutions. The Court should grant review to clarify the law in this important area.

In *amici*'s view, the arguments for a grant of review are all the more compelling due to the practical consequences in this case of the governmental endorsement of religion inherent in Section 4454. Unlike some cases involving such governmental endorsement, the harms caused by the law at issue in this case are not merely symbolic. The Eighth Circuit's decision upholding Section 4454 will have profoundly adverse effects on the lives of many children in this country. Its impact will extend far beyond the particular context of Medicaid and Medicare benefits. This Court's intervention is urgently needed to determine whether such a statute can stand.

Indeed, the issues at the heart of this case are especially timely in light of the new President's policy of encouraging faith-based organizations to participate fully in the provision of social services. *See* John J. DiIulio, Jr., *Know Us by Our Works*, Wall St. J., Feb. 14, 2001, at A22. The Director of the newly created White House Office of Faith-Based and Community Initiatives has stated that "nobody has suggested . . . that government should fund programs that make religious profession a condition of receiving services." *Id.* Yet, Section 4454 already provides a special government benefit to individuals professing a particular religious belief and delegates decisions about expenditures of government funds to religious institutions. Clearly, this case offers the Court an opportunity to address important First Amendment issues pertinent to the new Administration's plan to "reduce regulatory obstacles" to the partnership of government and religious organizations in providing social services.

Section 4454 harms the public, and especially children, in at least three ways. First, by providing Federal support for institutions that are based on faith healing, it may directly influence the behavior of parents, encouraging them to withhold from their children medical treatment that would mitigate or avoid serious physical harm, suffering, or death.

Second, Section 4454 places the government's imprimatur on efforts to secure special treatment for spiritual healing under State and other Federal laws. Thus, religious objectors to medical treatment have used the existence of Section 4454 and its predecessor as support for their efforts to obtain religious exemptions in both State and Federal child abuse and neglect statutes. The existence of these exemptions, in turn, encourages parents who object to medical treatment on religious grounds to deny their children such care.

Third, Section 4454 implicitly equates medical treatment with the nonmedical care provided in RNHCIs, thus blurring the line between medical science and faith healing. The resulting confusion between these two distinct concepts demeans the practice of medicine in the public eye and weakens the bond between physician and patient, which lies at the core of sound medical care.

1. The Petition correctly identifies a confusion in the Courts of Appeals as to the correct standards for analyzing statutes that are defended as "accommodating" religion by lifting "burdens" imposed by laws of general applicability. It also correctly argues that the Eighth Circuit's ruling in this case takes accommodation analysis to its furthest extreme, thus creating great tension with decisions of this Court barring governmental support or endorsement of religion. *See, e.g.*, *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) (describing "a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion"); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (stating that the Establishment Clause prohibits "state sponsorship of religious belief").

The Eighth Circuit held that Section 4454 serves a "secular legislative purpose" by removing a special burden upon persons who hold religious objections to medical care. It reasoned that such objectors "are forced to choose between adhering to their religious beliefs and forgoing all government health benefits, or violating their religious convictions and receiving the medical care provided by Medicare and Medicaid." Pet. App. 14a-15a. But this Court has never held that the existence of a governmental benefit, which members of a given religious group are barred from accepting due to their religious beliefs, can constitute a burden justifying creation of an alternative benefit targeted only at such religious adherents.

To the contrary, this Court's jurisprudence suggests that the existence of Medicare and Medicaid cannot be said to impose a burden on those who believe in faith healing and thus cannot justify creation of a benefit targeted at programs run by those groups. Indeed, even where a generally applicable government program imposes direct costs on the exercise of religion by religious entities, the Establishment Clause prohibits an exemption from such a "financial burden" targeted solely at religious bodies. *See Texas Monthly*, 489 U.S. at 25.

Sherbert v. Verner, 374 U.S. 398 (1963), and *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), which held that unemployment benefits had to be paid to individuals who refused to accept work that conflicted with their religious beliefs, do not change this analysis. In those cases, this Court did suggest that the denial of benefits burdened the free exercise of religion by forcing adherents to choose between their livelihood and their religious beliefs. But more recent precedent confirms that *Sherbert* and *Thomas* do not forbid enforcement of facially neutral and uniformly applicable governmental regulations. For example, *Bowen v. Roy*, 476 U.S. 693 (1986), held that the Free Exercise Clause does not compel the government to accommodate a religiously based objection to a statutory requirement that an applicant for certain welfare benefits provide his Social Security number. The Court explained:

> The statutory conditions at issue in [*Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, "without good cause," he had quit work or refused available work. The "good cause" standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an

> exemption to an instance of religious hardship suggests a discriminatory intent. . . . Here there is nothing whatever suggesting antagonism by Congress towards religion generally or towards any particular religious beliefs.

476 U.S. at 708. Similarly, in this case, the existence of generally available Medicare and Medicaid benefits, including a generally applicable requirement that those benefits be paid only for *medical* care, hardly could be called an indication of governmental hostility toward religion. It follows that there is no constitutional justification for "accommodating" religion by creating a special "RNHCI" benefit available only to individuals holding certain religious beliefs. *See id.*; *see also City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) ("[N]eutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."); *Employment Division, Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990) (questioning applicability of *Sherbert* outside unemployment compensation context).

Moreover, as the dissent below points out, the majority's logic "would allow nearly anything to be deemed a burden so as to permit an accommodation." Pet. App. 44a. For example, many students choose for religious reasons to forgo free public schooling in order to attend religious schools. In doing so, they give up the secular benefit of publicly funded education. By the majority's reasoning, the State's provision of free public education could be characterized as a "burden" upon a religious adherent's fundamental First Amendment right to attend religious schools in preference to public education. But neither this Court – nor, as far as we know, any other – has taken accommodation to such an extreme. At the same time, the theory espoused by the court below affects a wide array of Federal and State benefits that certain individuals may decline

for religious reasons. This Court's review of this issue is plainly necessary to address the Eighth Circuit's controversial and novel rule of law.

2. There could be no better illustration than this case of the compelling reasons for vigilant enforcement of the constitutional bar to laws that specifically benefit religious beliefs and practices, granting them both financial and symbolic support. For, in this instance, the likely harm is not merely offense to the sensibilities of non-believers or adherents of less-favored religious tenets. Here, Section 4454's implied endorsement of faith healing actually may encourage parents who object to medical treatment on religious grounds to deny their children medical care that would mitigate or avoid serious physical harm, suffering, or death.

The potential for such an effect on the behavior of parents should not be taken lightly. The denial of medical care to children on religious grounds has far-reaching and tragic consequences. One study found that 140 of 172 children who died after medical care was denied for religious reasons would have had at least a ninety percent chance of survival with medical care. *See* Seth M. Asser & Rita Swan, *Child Fatalities from Religion-Motivated Medical Neglect*, 101 Pediatrics 625, 625 (1998). Eighteen others had expected survival rates of between fifty and eighty-nine percent. *See id.* at 626-28. Of the ninety-eight children studied who did not suffer from cancer, ninety-two would have had an excellent prognosis with commonly available medical and surgical care. *See id.* at 626. Indeed, all but three of the 172 children would have received some benefit from medical care. *See id.* at 626-28. Even where not fatal, the denial of medical care sometimes has caused permanent physical disabilities and substantial suffering. *See* Caroline Fraser, *God's Perfect Child* (1999); Rita Swan, *Cry, the Beloved Children* (1997); Website of

Children's Healthcare Is a Legal Duty, Inc., http://www.childrenshealthcare.org (last visited Mar. 1, 2001).

Amici submit that "accommodation" of religion – if Section 4454 can be characterized as such – goes too far when its consequence is to encourage the denial to children of medical care that could save their lives or mitigate their suffering. "Parents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944). By implicitly endorsing faith healing in general, and Christian Science practices in particular, Section 4454 encourages parents to believe that denial of necessary and effective medical care to their children is scientifically sound and socially and legally acceptable. As a result, children are denied medical care that would prevent or mitigate suffering.[3]

In addition to affecting parental behavior directly, Congress's endorsement of religion in this instance has the potential to affect adversely the development of other laws.[4] By placing the

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[3] Federal payments to RNHCIs support parental denial of effective care to children in another way as well. The payments enhance the financial viability of these facilities, where Christian Science "nurses" are trained. The RNHCIs dispatch the "nurses" to the homes of ill children, where they provide "nursing care" to complement the prayer "treatment" of off-site Christian Science "practitioners." The presence of such a "nurse" reinforces the parents' belief that their child is receiving "treatment" and thereby discourages them from seeking medical care that might save the child's life, avoid complications, or reduce suffering. Consistent with their training and beliefs, Christian Science "nurses" do not recognize life-threatening signs and symptoms. *See infra*, at 14-15.

[4] Indeed, Section 4454 itself explicitly forbids state Medicaid plans to establish state agency oversight of RNHCIs. *See* 42 U.S.C. § 1396a(a).

imprimatur of the Federal government on faith healing, Section 4454 supports the efforts of the Christian Science Church and others to win religious exemptions from otherwise applicable state laws protecting children from medical neglect. Most States have exempted parents from liability for harms caused to children due to religiously based failure to seek medical treatment. *See, e.g.*, Fla. Stat. § 39.01(45) (providing that a parent "legitimately practicing religious beliefs in accordance with a recognized church or religious organization who thereby does not provide specific medical treatment for a child shall not, for that reason alone, be considered a negligent parent," and that a court may order either medical services or "treatment by a duly accredited practitioner who relies solely on spiritual means for healing" for the child); Me. Rev. Stat. tit. 22, § 4010 ("[A] child shall not be considered to be abused or neglected, in jeopardy of health or welfare or in danger of serious harm solely because treatment is by spiritual means by an accredited practitioner of a recognized religious organization."). These exemptions, in turn, encourage the denial of medical care to children, with the devastating consequences described above. *See* Charles Craig, *Twitchell: I Would Have Called Doc*, Boston Herald, June 6, 1990, at 20 (reporting that parent on trial for manslaughter due to the death of his child from denial of medical care on religious grounds believed that state law permitted him to practice spiritual healing without fear of prosecution, and quoting parent as saying that he provided medical care he thought was legally required).[5]

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[5] At least two state exemptions are indirectly affected by the Eighth Circuit's decision. The child neglect statutes of Colorado and West Virginia do not apply to cases in which a child is undergoing treatment in accordance with a "recognized method of religious healing," defined as a regimen reimbursable by private insurers. Colo. Rev. Stat. § 19-3-103(1), (2)(a)(II); W. Va. Code § 61-8D-4a(b). In fact, numerous private insurers

In support of these religious exemptions to child medical neglect laws, their proponents frequently have pointed out that the Medicare and Medicaid Acts pay for services provided in Christian Science sanatoria. Indeed, the Church instructs its lobbyists to cite the availability of Medicare and Medicaid reimbursements as evidence that Christian Science "treatment" is an "effectual alternative" to medical care for children. *Handbook of Policies and Procedures for Christian Science Committees on Publication*, Legislative Policy, at 5-7 (1988); *see also From Your Christian Science Neighbors*, Sarasota Herald-Tribune, May 9, 1989, at 11A (advertisement) ("Federal laws have long accommodated [Christian Science healing]. Christian Science care facilities and accredited Christian Science nurses are part of the Federal Medicare program.").[6]

History shows that Federal laws regarding spiritual treatment have a significant impact on State exemptions. Many of the current State statutory exemptions came into being as a result of the passage of the original Child Abuse Prevention and Treatment Act ("CAPTA") in 1974, which the Department of Health, Education and Welfare (now the Department of Health and Human Services) interpreted to require States in the grant program to include an exemption from abuse and neglect charges for parents who withhold medical treatment on

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do cover Christian Science "treatment" in their policies. *See* Valerie Richardson, *Culture, Et Cetera*, Wash. Times, Feb. 23, 2001, at A2. Since the reimbursement policies of private insurers often follow the lead of the Federal government, Section 4454 increases the likelihood that more cases will fall within these exemptions.

[6] The Sarasota Herald-Tribune advertisement defended the decision of a Christian Science couple to withhold medical care from their seven-year-old daughter, who died as a result of wholly treatable juvenile diabetes. *See Hermanson v. Florida*, 604 So. 2d 775 (Fla. 1992).

religious grounds. *See* Child Abuse and Neglect Prevention and Treatment Program, 39 Fed. Reg. 43,935-36 (1974).[7]

The Christian Science Church has also used Section 4454 and its predecessor, and other Federal laws, as justification for religious exemptions in other Federal statutes. For example, the Church has pointed to the existence of Federal Medicare and Medicaid reimbursements for services provided in Christian Science sanatoria when lobbying for spiritual exemptions in CAPTA. It cited Section 4454's predecessor statute in an effort to win a religious exemption to the Child Abuse Amendments of 1984, Pub. L. No. 98-457, 989 Stat. 1749. *See* Washington, D.C. Office, Christian Science Committee on Publication, *Rationale for Christian Science Amendment to H.R. 1904*, at 2 (1983). Similarly, in hearings on the Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, 110 Stat. 3063, a Christian Science representative argued that the recognition accorded Christian Science practitioners by other Federal legislation justified a repeal of regulations regarding religion motivated neglect. *See Child Protection: Hearing Before the Subcomm. on Children and Families of the Senate Labor and Human Resources Comm.*, 104th Cong. 4 (May 25, 1995) (statement of Philip G. Davis) (pointing out that Christian Science treatment "was covered in three of the major bills from Congress last year on National Health Care Reform").[8]

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[7] In 1983, however, the Department revised its regulations to provide that they should not be construed as requiring or prohibiting a finding of neglect when a parent practicing his or her religious beliefs does not, on that basis alone, provide medical treatment for his or her child. *See* 45 C.F.R. § 1340.2(d)(2)(ii) (1983).

[8] CAPTA is due to be reauthorized in this Congress. In addition, Colorado lawmakers are currently reconsidering a religious exemption to the state

Finally, by permitting expressly nonmedical institutions to participate in a program otherwise dedicated to medical care, Section 4454 promotes the view that nonmedical spiritual treatment is the equivalent of medical care. That position is utterly erroneous and potentially harmful to the health of all patients, particularly children.

According to the doctrine of the Christian Science Church, "Christian Science treatment and medical treatment proceed from opposite standpoints." Official Home Page of the First Church of Christ, Scientist, http://www.tfccs.com/GV/QANDA/CSHQ7.html (last visited Mar. 1, 2001). Christian Scientists view Christian Science treatment and medical science as antithetical: "To try to heal from opposite systems may be unfair to the patient and could be counterproductive to healing." *See id.* The Christian Science "nurses" whose services are reimbursable under Medicare and Medicaid are not nurses in the generally understood sense of the term. While State laws typically require that registered professional and licensed practical nurses graduate from an approved nursing program that provides specified training, pass the National Council Licensure Examination, and participate in continuing education programs, Christian Science nurses need not meet any of these standards. *See, e.g.*, *Quigley v. First Church of Christ, Scientist*, 65 Cal. App. 4th 1027, 1032 (1998) ("Standard training for [Christian Science] nurses covers only how to bathe and feed patients and how to change bed linen.").

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medical neglect laws in the wake of the deaths over the last two years of three children whose parents denied them medical treatment on religious grounds. *See* Michael Janofsky, *Colorado Children's Deaths Rekindle Debate on Religion*, N.Y. Times, Feb. 21, 2001, at A10. *Amici* are concerned that Section 4454 will again provide fodder for the argument that religiously motivated medical neglect should be treated differently under the law than non-religiously motivated medical neglect.

On the other hand, Christian Science "nurses" must be members of the Christian Science Church and, in the course of attending patients, pray with their charges, read to them from Christian Science literature, and remind them of Christian Science doctrine about sin, disease, and death. Thus, by equating the services provided by Christian Science "nurses" with the medically based care provided by licensed nurses, Section 4454 blurs the line between medical science and spiritual treatment – further encouraging reliance on the latter as a valid mode for treating the seriously ill.

The First Amendment is a bulwark against governmental restriction on adults who wish to follow their own religious beliefs. But it also should be a bulwark against laws that, while purporting to "accommodate" religion by lifting "burdens," effectively put the force of governmental endorsement behind such religious beliefs – particularly those that pose a threat to the welfare of children.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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